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In the Supreme Court of the United States

October Term, 1976

No. 75-1452

KIMBELL, INC., d/b/a FOODWAY,
FURR'S, INC., SAFEWAY STORES, INC., and
SHOP RITE FOODS, INC., d/b/a PIGGLY WIGGLY
Appellants,

vs.

EMPLOYMENT SECURITY COMMISSION
OF THE STATE OF NEW MEXICO

and

LANA JEAN NOLAN, *et al.*,
Appellees.

On Appeal From The Supreme Court Of The
State Of New Mexico

SUPPLEMENTAL BRIEF IN RESPONSE TO
MEMORANDUM FOR THE UNITED STATES AS
AMICUS CURIAE

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INTRODUCTION

Appellants herein respectfully present this brief in response to the Memorandum for the United States as *Amicus Curiae* submitted by the Solicitor General pursuant to this Court's order of June 1, 1976, inviting the Solicitor General to express the views of the United States in this case.

SUMMARY OF ARGUMENT

The Solicitor General's view that legislative history demonstrates Congressional intent to leave to the states the decision whether to pay unemployment compensation to employees engaged in a labor dispute is at odds with reported case authority and is erroneous. Likewise, the Solicitor General's assertion that New Mexico's interest in paying unemployment compensation benefits to strikers outweighs any harm which such payments might do to the collective bargaining process is not supported by the record or the law.

The Solicitor General erroneously asserts that there is no conflict of decisions requiring resolution by this Court. Indeed, there is a direct conflict between the view of the Supreme Court of New Mexico, as enunciated by the Solicitor General, and federal court decisions. That there are few conflicting decisions on the issue in this case should not be determinative as to whether this Court should grant plenary review. The issue raised has been thoroughly discussed in reported cases and commentaries. The record is adequate for review and the issue is too important to be disposed of in summary fashion. Substantial interest shown by briefs as *amicus curiae* and the confusion on this issue in cases decided in the lower courts and in pending cases suggests a need for resolution of the issue.

DISCUSSION

A. Legislative History Does Not Establish Congressional Intent to Leave to State Governments the Discretion to Permit Payment of Unemployment Compensation Benefits to Strikers.

The Solicitor General argues that the legislative history of the National Labor Relations Act, 49 Stat. 449, *et seq.*, as amended, 29 U.S.C. §151, *et seq.*, and the Social Security Act, 49 Stat. 620, Title IX of which, 49 Stat. 639-45, is now the Federal Unemployment Tax Act, 26 U.S.C. §3301, *et seq.*, together with Congressional action in analogous programs

indicate Congressional intent to leave to the states the judgment whether to pay unemployment compensation benefits to strikers. (U.S. Mem. at 5-8).¹ In this conclusion, the Solicitor General and, implicitly, the Supreme Court of New Mexico stand alone.

In only two reported decisions have courts attempted to ascertain Congressional intent by tracing Congressional history. After an exhaustive review of the relevant history, the First Circuit in *Grinnell Corp. v. Hackett*, 475 F.2d 449 (1st Cir. 1973), *cert. denied*, 414 U.S. 858 (1973), noted that "the existing legislative record is not sufficiently clear to establish Congressional intent either way", 475 F.2d at 454, and concluded that "unambiguous Congressional intent is lacking." 475 F.2d at 457. *Accord, Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations*, 405 F. Supp. 275, 285-86 (D. Hawaii 1975). In its brief as *amicus curiae* submitted herein, at page 13, the Chamber of Commerce of the United States cites several unreported cases in addition to the *Grinnell* and *Hawaiian Telephone* decisions, in all of which the courts have concluded that the legislative history is ambiguous. The courts are, thus, unanimous in this conclusion.

Each of the supposed indicia of Congressional intent on which the Solicitor General focuses in his Memorandum has been considered and rejected by the courts. First, the Solicitor General emphasizes that within a few years of the enactment of the Social Security Act the Secretary of Labor approved four state laws which allowed payment of unemployment compensation benefits to strikers. (Mem. U.S. at 6). However, such action is immaterial since under the provisions of 68A Stat. 443, 26 U.S.C. §3304(a) approval is *mandated* if certain minimum requirements set forth in that section are met. *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations*, 405 F. Supp. at 285. Subsection (5)(A)

¹ "Mem. U.S." refers to the Memorandum for the United States as *Amicus Curiae*.

provides that a plan for payment of unemployment compensation benefits will not be approved which denies compensation to "any *otherwise eligible individual* for refusing to accept new work...if the position offered is vacant due directly to a strike, lockout, or other labor dispute...." 68A Stat. 443, 26 U.S.C. §3304 (a) (5) (A). Thus, the provision is not related to payment of unemployment compensation benefits to employees who leave their work as a result of a strike.

Next, the Solicitor General points to the fact that a 1947 amendment to the Taft-Hartley Act was passed by the House providing that a striker who accepts unemployment compensation benefits would no longer be considered an "employee" under the National Labor Relations Act and thus would lose all rights under that Act. (Mem. U.S. at 6-7). The amendment, however, was directed at the unemployment compensation laws of Rhode Island and New York, which provide for payment of benefits to strikers after a certain specified waiting period, a fundamentally different approach from New Mexico's in the scope of its application. *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations*, 405 F. Supp. at 286. The amendment was removed without explanation in conference committee.

Given (the silence of the conference committee), the enormous political controversy surrounding the Taft-Hartley Act, and the consequent need for compromises, perhaps unreasoned or hasty, we cannot read this deletion and the subsequent approval of the conference bill as specific congressional resolution of the problem. *Grinnell Corp. v. Hackett*, 475 F.2d at 455.²

² It could also well be that Congress viewed this proposed provision as superfluous since it had enacted the National Labor Relations Act and Title IX of the Social Security Act in 1935, with the former being designed to define and protect the rights of *employed* workers and the latter being concerned with caring for the needs of the *unemployed*. Section 2(3) of the National Labor Relations Act, 49 Stat. 450, as amended, 29 U.S.C. §152(3), preserves "employee" status to strikers for the duration of a strike. To deprive those receiving unemployment compensation benefits during a strike of "employee"

The Solicitor General also relies upon certain remarks made by Representative Wilbur Mills in 1969 in connection with rejection by the House of certain amendments to the social security statutes proposed by President Nixon, including a proposal that strikers be deemed ineligible for such benefits. (Mem. U.S. at 7). Again, the purpose of that legislation was to negate the effect of the New York and Rhode Island unemployment compensation statutes. *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations*, 405 F. Supp. at 286. Indeed, from Congressman Mills' remarks one might conclude that he was under the impression that *only* two states paid unemployment compensation benefits to strikers and that he was not aware of the "stoppage of work" interpretation given the labor dispute qualification provision in the unemployment compensation statutes of a majority of the states which permits the payment of benefits to strikers. As the court in *Grinnell* observed:

We are aware of the importance and power of the House Ways and Means Committee and of the significance of its Chairman's statements on bills within its jurisdiction. Yet, in the absence of any floor amendment or debate related to that particular change in either house, and of any real consideration of the issue at any level in the Senate, we cannot take the House Committee's deletion, and Congress' subsequent approval of the substitute bill, as a clear indication of the intent of the entire Congress not to preempt unemployment payments to strikers. 475 F.2d at 456.

Finally, the Solicitor General attempts to divine Congressional intent to permit states full discretion in granting unemployment compensation benefits to strikers because in certain instances Congress has acted to grant or deny such

status might thus have been thought unnecessary since so long as one is an "employee" he is logically not "unemployed" so as to be available for unemployment compensation benefits.

benefits in specific contexts. (Mem. U.S. at 6, n. 5). For example, in 1935 Congress enacted the District of Columbia Compensation Act which contained a provision denying unemployment compensation benefits to strikers. However, because of the relative political vacuum in which Congress acts in legislating for the District of Columbia, "at the most, one can conclude that Congress *might* have wished the District's policy upon the states *if* it did not have to heed its several constituencies." *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations*, 405 F. Supp. at 285.

The Solicitor General also finds significance in Congress' limitation on the award of unemployment compensation benefits under the Railroad Unemployment Insurance Act in the event the unemployment is due to a strike. 52 Stat. 1094, *et seq.*, as amended, 45 U.S.C. §351, *et seq.*³ And, finally, the Solicitor General points to a 1971 amendment to the Food Stamp Act, 84 Stat. 2048, *et seq.*, 7 U.S.C. §2011, *et seq.*, requiring the Secretary of Labor to set up "uniform national standards of eligibility", 84 Stat. 2049, 7 U.S.C. §2014(b). The Food Stamp Act, as amended, specifically requires a national standard for households with able-bodied adults who fail to accept employment but makes certain exceptions, including "refusal to work at a plant or site subject to a strike or a lockout for the duration of such strike or lockout." 84 Stat.

³ The disqualification provision contained in 45 U.S.C. §354 (a-2) (iii) is almost identical to the wording contained in the New Mexico labor dispute disqualification provision, §59-9-5(d) N. M. Stat. Ann. (Supp. 1975), which, as noted by the Solicitor General in note 3 at page 4 of his Memorandum, was patterned after a draft bill prepared by a committee of the Social Security Board. A substantially identical "stoppage of work" provision is contained in thirty state unemployment compensation statutes. However, in the Railroad Unemployment Insurance Act, Congress added an additional proviso that one is disqualified only if "the Board finds that (the) strike was commenced in violation of the provisions of the Railway Labor Act or in violation of established rules and practices of a bona fide labor organization." 52 Stat. 1098, as amended, 45 U.S.C. §354(a-2) (iii). It might thus be argued that Congress viewed the language of the draft bill as imposing a blanket disqualification on all strikers from receiving unemployment compensation benefits unless the proviso further limiting the disqualification were added.

2049, 7 U.S.C. §2014(c).⁴

Faced with the same arguments concerning Congressional action in analogous situations, the First Circuit in *Grinnell* concluded:

The existence and interpretation of these provisions in analogous programs might be read as indicating a broad Congressional intent not to preempt payments to strikers under public assistance statutes. Yet, given the

⁴ The political considerations involved in denying unemployment compensation benefits to strikers and in depriving their children of food are obviously different. Also, the impact of the latter action on collective bargaining would be substantially different since food stamps are not financed by employer contributions.

The language of 7 U.S.C. §2014(c) is not a *grant* of food stamps to strikers but, rather, an exception from disqualification. As such, this section is identical in approach to 26 U.S.C. §3304(a), which provides that the Secretary of Labor shall approve a state law for unemployment compensation benefits so long as it meets certain minimum standards, including the provision not disqualifying "any otherwise eligible individual for refusing to accept new...work if the position offered is vacant due directly to a strike, lockout, or other labor dispute...." 68A Stat. 443, 26 U.S.C. §3304(a) (5) (A).

The Food Stamp Act, as originally enacted, was not generally understood by Congress to provide eligibility for strikers. *See* 116 Cong. Rec. 42,015 (1970) (remarks of Congressman Abbitt). Nonetheless, since there was no express language denying payment of food stamp benefits to strikers, over the years more and more strikers were determined eligible to obtain such benefits. In 1968, 1970 and 1973-1974, Congress rejected efforts to disqualify strikers from receiving benefits under the Food Stamp Act. However, the rejections may have been premised more on a political trade-off between proponents of farm subsidies and opponents of the striker disqualification amendment than on the merits of the issue. Thus, with regard to the 1973-1974 amendment attempt, Senator Humphrey stated:

I simply say to my colleagues, if you want a farm bill, you must vote down (the striker disqualification) amendment (to the Food Stamp Act), because it will precipitate such a debate in the House that there will be no bill, and I say, most respectfully, we must have a farm bill. Our current farm laws expire this year. 119 Cong. Rec. 26,909 (1973); *see also* 114 Cong. Rec. 28,314 (1968), 116 Cong. Rec. 42,035 (1970).

ability of Congress to articulate that intent in other programs, one might also infer that its silence in the unemployment compensation statute was indicative of a contrary intent. That, too, however, is not a reasonable inference, given the pre-1935 policy, the 1935 Acts and the rejection of explicitly prohibitory legislation in both 1947 and 1969. *The most that can fairly be said, in the face of this legislative record, is that Congress has been and presently is aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances.* 475 F.2d at 456-57. (Emphasis added).

B. The Absence of a Record Below Specifically Demonstrating the Quantum of Impact on Collective Bargaining Stemming from the Granting of Unemployment Compensation Benefits to Strikers Should Not Deter the Court from Plenary Review of this Case.

The Solicitor General questions whether the record below establishes that the awarding of unemployment compensation benefits would have a substantial impact upon the collective bargaining process. (Mem. U.S. at 8-10). Appellants submit that a detailed evidentiary record is immaterial to plenary consideration of the issues raised in this case, since *a priori* payment of unemployment compensation benefits to strikers can have only an adverse impact on the free collective bargaining structure established by Congress. It is, Appellants submit, beyond question that the prospect of monetary benefits would buoy the spirits and increase the determination of strikers or prospective strikers.

The erroneous notion that a detailed evidentiary record is required in a case such as this to establish the quantum of impact on the collective bargaining process was spawned by the First Circuit's analysis of the preemption doctrine in *ITT Lamp Division v. Minter*, 435 F.2d 989 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971) and perpetrated in the subsequent decision of that Court in *Grinnell Corp. v. Hackett*, *supra*. According

to the First Circuit, unless Congress has clearly manifested its intention to occupy the area, the court must balance the degree and relative importance of federal and state interests in applying the preemption doctrine where there is asserted conflict between state regulation and unfettered collective bargaining.

This Court has never employed a "balancing" process in applying the preemption doctrine. Indeed, it would seem clear from the Court's recent decision in *Machinists Union v. Wisconsin Employment Relations Commission*, 96 S. Ct. 2548 (1976), that the emergence of such an approach is not imminent. The inquiry, instead, is as to the outer limits of Congressional concern in preserving economic self-help as a legitimate weapon in the free play of economic forces in labor-management relations. As stated in the *Machinists Union* case:

Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding preemption is the same: whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes." *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 380. 96 S. Ct. at 2556-57.

The same reasoning is applicable where the exercise of plenary state authority assists one side or the other to survive the impact of the self-help measures.

Here, the conflict appears on the face of the state activity and an analysis of the quantum of impact is neither required nor in most cases possible. This Court needed no detailed evidentiary record in *Super Tire Engineering Co. v. McCorkle* to conclude that:

It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing

collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract. The question, of course, is whether Congress, explicitly or implicitly, has ruled out such assistance in its calculus of laws regulating labor-management disputes. In this sense petitioners allege a colorable claim of injury from an extant and fixed policy directive of the State of New Jersey. That claim deserves a hearing. 416 U.S. 115, 124 (1974). (Footnotes omitted and emphasis added).

Similarly, in the *Machinists Union* case, without an evidentiary record, this Court observed with regard to the cease and desist order of the Wisconsin Employment Relations Commission that "there is *simply no question* that the Act's processes would be frustrated in the instant case were the State's ruling permitted to stand." 96 S. Ct. at 2557 (Emphasis added).

Abundant factual proof of the general impact of the payment of unemployment benefits to strikers is readily available. Although the District Court in *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations*, 405 F. Supp. at 277, expressed its doubt that an evidentiary hearing was required in view of the language in *Super Tire* quoted *supra*, it ordered a hearing nonetheless because it concluded that a hearing would "be of assistance in the ultimate resolution of the problem before this court." That hearing confirmed the existence of substantial impact. The brief as *amicus curiae* filed herein by the Chamber of Commerce of the United States indicates at pages 21 and 22 that similar evidence confirming the substantial impact of the payment of unemployment compensation benefits to strikers was adduced in the *New York Telephone* case.

The finding of the trial court in *Hawaiian Telephone* and the evidence adduced in the pending *New York Telephone* case only confirm the conclusion of the research study conducted by the Industrial Research Unit of the Whorton School of

Business at the University of Pennsylvania that "the availability of public support for strikers...increase(s) the propensity of unions to undertake strikes, and...increase(s) the probability that they will be longer, costlier, or both." . A. Thieblot & R. Cowin, *Welfare and Strikes, the Use of Public Funds to Support Strikes*, 217 (1972) (Footnotes omitted). In any event, in most cases there would be no way of adducing evidence to prove definitely whether payment of unemployment benefits would make a strike longer or costlier.

Specifically, The Solicitor General urges that application of the "stoppage of work" provision in the New Mexico striker disqualification section removes any substantial impact from payment of benefits since it does not "provide the strikers with an expectation of payment upon which they could rely in planning their strategy." (Mem. U.S. at 9).⁵ The facts in this case demonstrate beyond question that the strike imposed a severe economic burden on all of the employers and the receipt of \$47,459 in unemployment compensation benefits undoubtedly assisted the strikers to survive the impact of the strike. (Jurisd. Stat. at 5-6). Since the New Mexico Supreme Court interprets "stoppage of work" to refer to the employer's operation, the state would assist strikers only when they were unable to readily achieve their objectives through a successful strike, i.e., when public assistance would be vital to maintaining the strike.⁶ Strikers are disqualified only if there is a "stoppage of work" at the employer's premises. Thus, those engaged in successful strikes where the employer's business is

⁵ The genesis and evolution of the interpretation of the "stoppage of work" disqualification clause in the New Mexico statute and the statutes of most states is thoroughly discussed in *Hawaiian Tel. Co. v. State Dept. of Labor & Indus. Relations*, 405 F. Supp. at 287-88.

⁶ The Solicitor General emphasizes that in rejecting the decision of the federal district court in *Hawaiian Tel. Co. v. State Dept. of Labor & Indus. Relations*, *supra*, the Supreme Court of New Mexico stressed that even a striker is eligible for unemployment compensation benefits only if he is "available for, and actively seeking work". (Mem. U.S. at 4). It should be noted, however, that

totally shut down or severely curtailed would not be entitled to unemployment compensation benefits. Indeed, they undoubtedly would not need them since the employer would have to give in to their demands. Yet those in need of assistance because the employer is able to operate successfully in spite of the union's economic pressure would be aided.⁷ As this Court recently emphasized in *Machinists Union v. Wisconsin Employment Relations Commission*, *supra*:

(T)he economic weakness of the affected party cannot justify state aid contrary to federal law for, "as we have developed, the use of economic pressure by the parties to a labor dispute is not a grudging exception (under)... the (federal) Act; it is part and parcel of the process of collective bargaining." *Insurance Agents*, 361 U.S., at 495. The state action in this case is not filling "a regulatory void which Congress plainly assumed would not exist," *Hanna Mining Co. v. Marine Engineers*, 382 U.S., at 196 (Brennan, J., concurring). Rather, it is

the Supreme Court of New Mexico has interpreted this phrase in the context of a labor dispute to require only that a striker seek temporary intervening work. *Albuquerque Phoenix Express, Inc. v. Employment Security Comm'n.*, 88 N.M. 596, 598-99, 544 P.2d 1161, 1163-64 (1975) (Jurisd. Stat., Appendix at 4a, 6a-7a).

⁷ The Solicitor General would minimize the impact of the payment of unemployment compensation benefits in this case by the fact that the Employment Security Commission did not make its award until the strike had been over for six months. However, as noted by Mr. Justice Blackmun in the *Super Tire* case, 416 U.S. at 123, the impact of the payment of public assistance benefits to strikers affects not only the specific strike at issue but also the "ongoing relationship" and must have a presumed effect on future strikes. Also, it should be noted that in response to the decision of this Court in *California Dept. of Human Resources Dev. v. Java*, 402 U.S. 121 (1971), the New Mexico Legislature amended the New Mexico unemployment compensation law in 1972. Section 59-9-6F N. M. Stat. Ann. (2d Repl. 1974) now provides that benefits must be paid immediately upon a determination of eligibility by a deputy, subject to a right of appeal.

clear beyond question that Wisconsin "(entered) into the substantive aspects of the bargaining process to an extent Congress has not countenanced." *NLRB v. Insurance Agents*, *supra* at 498. 96 S. Ct. at 2557.

C. Among Other Reasons Militating in Favor of Plenary Review by the Court, There Exists a Conflict of Decisions Requiring Resolution by the Court.

In *Grinnell Corp. v. Hackett*, *supra*, the First Circuit found the record regarding Congressional intent concerning whether payment of unemployment benefits to strikers would infringe upon federal labor policy to be ambiguous. Therefore, the court remanded the case for an evidentiary hearing concerning the impact of the payment of unemployment compensation benefits upon strikes. The Solicitor General, on the other hand, urges summary affirmance of this case since unambiguous Congressional intent establishes that Congress left to the states full discretion to determine whether unemployment compensation benefits ought to be paid to strikers. (Mem. U.S. at 5-9). Thus, there is a clear conflict between views of the First Circuit in *Grinnell Corp.* and the District Court in *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations*, *supra*, and the views of the Solicitor General.

Here the District Court concluded:

Under the facts of this case payment of unemployment compensation benefits to the claimants herein would interfere with the national policy of Federal Labor Law of encouraging self organization and collective bargaining without state interference in the use of economic weapons available to both labor and management, including the policies enunciated in 29 U.S.C. §§157-158, in contravention of the Supremacy Clause of Article VI of the Constitution of the United States. (R. 174; Jurisd. Stat. at 7).

Even though it reversed the District Court's decision, the Supreme Court of New Mexico did not disturb this conclusion and did not examine the underlying facts alleged to constitute the interference. Under these circumstances, the decision of the New Mexico Supreme Court can logically be based only upon agreement with the conclusion of the Solicitor General concerning the legislative history. Thus, the decision of the Supreme Court of New Mexico in this case is squarely in accord with the views expressed by the Solicitor General and is in conflict with the decisions of the First Circuit and the United States District Court for the District of Hawaii. Such conflict should be resolved by this Court.

The timeliness and importance of the issue raised in this case are underscored by the cases currently pending before this Court concerning the constitutionality of the payment by state governmental agencies of public assistance benefits to strikers. In addition to this case, two other cases are before the Court, *Chamber of Commerce of the United States of America v. Frances*, petition for cert. filed, 44 U.S.L.W. 3494 (U.S. Feb. 19, 1976) (No. 75-1182), involving the question of whether striker eligibility for welfare benefits is constitutional, and *Ohio Bureau of Employment Services v. Hodory*, appeal filed, 44 U.S.L.W. 3686 (U.S. May 25, 1976) (No. 75-1707), involving the question of whether a state might permissibly deny unemployment compensation benefits to nonstriking employees who are laid off solely because of a strike. Together, these three cases present significant unanswered questions concerning the permissibility of public assistance to strikers and other workers idled as a consequence of a strike.⁸

The fact that a number of cases involving the same issue are currently being litigated in lower courts also suggests a need

⁸ Indeed, this case involves payment of unemployment compensation benefits not only to strikers but also to employees who were locked out by members of the industry bargaining group. (Jurisd. Stat. at 5). Thus, the case affords the opportunity to consider whether there are different considerations involved in payment of unemployment compensation benefits to locked out employees as opposed to strikers.

for some action.⁹ Finally, the submission of briefs as *amicus curiae* by the Chamber of Commerce of the United States and others is also an indication of the importance of the issue raised.

CONCLUSION

For the foregoing reasons and for the additional reasons set forth in Appellants' Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted,

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⁹ The cases and their current status are cited at pages 2 and 3 of the Motion of the Chamber of Commerce of the United States of America for leave to file a brief as *amicus curiae* filed herein.









